State of Alaska
Ombudsman

INVESTIGATIVE REPORT

This investigative report has been edited and redacted to remove information made confidential by Alaska Statute and to protect privacy rights.

Ombudsman Complaints A2014-0895; A2014-1059; A2014-1275
Finding of Record and Closure
August 31, 2015

Summary of the Complaint

During 2014 the Ombudsman received a number of complaints arising from disciplinary cases at the Palmer Correctional Center (PCC). This investigation covers some of the complaints, while others were investigated separately.

On June 3, 2014, Inmate 1 complained to the Ombudsman's office that the Department of Corrections (DOC) Palmer Correctional Center had imposed disciplinary sanctions on him without due process of law. Specifically, the PCC disciplinary board found Inmate 1 guilty of attempt to escape and punished him, but did not present substantial evidence against him or afford him an opportunity to confront witnesses.

At the time of the events leading to this complaint, Inmate 1, age 34, was a federal prisoner being held by DOC and designated by DOC to PCC. He pleaded guilty to federal charges of conspiring to distribute, and possession with intent to distribute, cocaine, oxycodone, and marijuana from the Lower 48 into Alaska. At the time of the events in this case he was a pre-sentence prisoner; because he had not been sentenced, no release date had yet been determined. He has since been sentenced and transferred to federal custody and is no longer housed in Alaska DOC custody as of this writing.

On July 1, 2014, Inmate 2, age 49, complained to the Ombudsman's office that the PCC disciplinary board had imposed disciplinary sanctions on him without due process of law. Specifically, PCC found Inmate 2 guilty of attempt to escape and punished him, but did not present him with substantial evidence against him or afford him an opportunity to confront witnesses. Inmate 2 is incarcerated for second degree murder committed and has a release date in 2030. He is housed in Spring Correctional Center as of this writing.

On August 12, 2014, Inmate 3 complained to the Ombudsman's office that PCC had imposed disciplinary sanctions on him without due process of law. Specifically, PCC found Inmate 3 guilty of attempt to escape and punished him, but did not present substantial evidence against him or afford him

an opportunity to confront witnesses. Inmate 3, age 71, is incarcerated for life for murder committed in the 1970s. He is housed at Spring Creek Correctional Center as of this writing.

These three cases all arise from a single alleged incident.

The Ombudsman opened an investigation into the following allegations for each of these three complainants, stated in terms conforming to AS 24.55.150:

> ***CONTRARY TO LAW: The Department of Corrections Palmer Correctional Center denied inmates charged with identical disciplinary infractions a meaningful opportunity to appeal a disciplinary action by failing to make findings of fact in an administrative hearing.***
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> ***CONTRARY TO LAW: The Department of Corrections Palmer Correctional Center imposed punitive sanctions on inmates charged with identical disciplinary infractions without sufficient evidence.***
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> ***CONTRARY TO LAW: The Department of Corrections Palmer Correctional Center denied inmates charged with identical disciplinary infractions due process by not allowing the inmates to confront witnesses against them in disciplinary hearings.***
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> ***CONTRARY TO LAW: The Department of Corrections Palmer Correctional Center violated applicable regulations by failing to state orally on the record why confidential informants were not called to testify at disciplinary board hearings and by failing to prepare required reports documenting reliance on confidential informants.***

Ombudsman Linda Lord-Jenkins gave written notice of the investigation of Inmate 1's complaint, A2014-0895, to PCC Superintendent Tomi Anderson on July 10, 2014. The Ombudsman notified Superintendent Anderson of the investigation of Inmate 2's complaint, A2014-1059, on July 30, 2014; and of the investigation of Inmate 3's complaint, A2014-1275, on August 14, 2014.

Assistant Ombudsman Dale Whitney investigated these allegations with assistance from Intake Assistant Megan Gosda and forwarded his report to the Ombudsman.

INVESTIGATION

Method of Investigation

The complaints in this case arise out of an alleged incident that resulted in seven inmates being served with identical accusations of misconduct at Palmer Correctional Center. Only three of the seven inmates filed complaints with the Ombudsman but the ombudsman investigator reviewed disciplinary investigative records for all seven inmates accused of misconduct, and an eighth inmate who originally was thought to be involved and similarly charged but was exonerated by the PCC disciplinary board.

During the investigation of the complaints, the ombudsman investigator interviewed the complainants and PCC Superintendent Tomi Anderson, and listened to recordings of the hearings held for all seven of the accused inmates, as well as a recording of the hearing held for the eighth inmate who was found not guilty. The investigator also read all written materials prepared by DOC during the disciplinary hearings, all related appeal documents, and various emails regarding the matter. Finally, the investigator reviewed applicable Alaska Statutes and Alaska Administrative Code governing conduct of disciplinary hearings as well as court rulings on administrative hearings held in prisons.

DOC initially refused to provide unredacted copies of any document that would identify the confidential informant involved in the case and the Ombudsman subpoenaed the information per AS 24.55.170.

After the Ombudsman served the department with a subpoena[1], then-Director of Institutions Bryan Brandenburg wrote to the investigator:

> Sir, I can certainly appreciate that you have a job to do and that an important aspect of that job is to ensures there is system of checks and balances. I can assure you that I and my staff do our best to cooperate fully with your offices requests and investigations (*sic*).
>
> However, this case is different. The individuals you are representing are extremely dangerous and violent offenders who have been in our system for a considerable period of time. They were planning an escape that part of which included the killing of one of my staff. The individual who provided us with that information is extremely creditable and helped us avoid not only the potential escape but the possibility of losing one of my staff.
>
> Due to these circumstances I cannot release to you the CI's [confidential informant] name or information that would lead to his identification as it would place his life in danger. I hope that you can understand and appreciate my situation.
>
> Thanks.

Eventually then-Commissioner Joseph Schmidt directed the Department to honor the ombudsman's subpoena and provided the ombudsman unredacted copies of all documents and emails related to the complaint. These unredacted documents revealed that no evidence directly linked any of the eight accused inmates with any suggestion or talk of killing anybody. The documents also showed that the department was aware all along that, in fact, the name of the confidential informant had already been released to at least one of the accused inmates by his lawyer. The ombudsman investigator then interviewed the confidential informant off-site and listened to recordings of hearings in previous unrelated disciplinary cases in which the confidential informant was accused of other unrelated disciplinary infractions.

FACTS OF THE CASE

According to emails and memos written later, rumors were circulating about a possible escape attempt at Palmer Correctional Center early in May 2014. As one might expect with prison gossip, the original source of these rumors is unclear. But, sometime during **May 5 to May 7, 2014,** a PCC inmate informed PCC Sergeant Francis Buzby that several inmates were planning to escape from Palmer Correctional Center. It appears that the Confidential Informant (Informant) made two reports. In the first, he named three inmates, and Sgt. Buzby asked him to get more names. A day or two later, the Informant provided the names of four more inmates who he said were "involved." Sgt. Buzby never reported exactly what, if

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[1] **Alaska Statute 24.55.170 Powers.** (a) Subject to the privileges that witnesses have in the courts of this state, the ombudsman may compel by subpoena, at a specified time and place, the

(1) appearance and sworn testimony of a person who the ombudsman reasonably believes may be able to give information relating to a matter under investigation; and

(2) production by a person of a record or object that the ombudsman reasonably believes may relate to the matter under investigation.

(b) If a person refuses to comply with a subpoena issued under (a) of this section, the superior court may, on application of the ombudsman, compel obedience by proceedings for contempt in the same manner as in the case of disobedience to the requirements of a subpoena issued by the court or refusal to testify in the court. (§ 1 ch 32 SLA 1975; am § 10 ch 71 SLA 1990) [Emphasis added]

anything, the Informant claimed these individuals had specifically done to make them "involved," or when they did it.

On **May 7, 2014,** at 10:06 a.m. PCC Superintendent Anderson sent an email addressed to Division of Institutions Operations Manager Floyd L. Sherman[2] in which she wrote:

> On 5/7/14 at approximately 0815 hours Sgt. Buzby informed me that a confidential informant stated that some prisoners were going to escape from PCC. The CI [confidential informant] stated there are approximately 7 prisoners and he gave us 3 of the names at this time. The CI is going to try to get us the rest of the names this morning. According to the CI, the escape information is being discussed on the compound and not a big secret.
>
> Security Sergeant Buzby,
>
> Prisoner's escape plan – Overtake the shift office on the night shift: Shift 1 – Sgt. Dellinger. They want to take her keys and walk out the door. Supposedly, the prisoners are collecting clothes for the event. It was stated that since there are two (2) female officers working inside the medium houses, that the prisoners could easily overtake them.

Several hours later Superintendent Anderson followed up with another email, reading in part:

> Update –
>
> The CI added that he believes the breakout will be soon since the prisoners are speaking about it so much on the compound. Also, the prisoner added that the group is speaking about using heavy equipment from the minimum facility and they are going to use the medical hallway as their possible escape route.

The Informant's report of a plan to use heavy equipment to drive through the prison fence suddenly took on alarming credibility when, at about the same time, the key to a John Deere loader was reported missing by the inmate who had, and was authorized to have, the key. According to a memo from a mechanic to the PCC maintenance foreman:

> On May 6th at approximately 1500 hours [Inmate 8] told me he could not locate his John Deere key. I took [Inmate 8] to retrace his whereabouts that day including checking all the John Deeres for said key. When we could not locate the key I called security at 1515 hours to let them know the key was missing.
>
> After calling Security I told Inmate [Inmate 8] to check all of his clothing for the key. At about 1530 hours Inmate [Inmate 8] located the key in his jacket. I then called Security back to inform them to that the key had been located. (*sic*)

Inmate 8's name was not ever mentioned by the Informant. Inmate 8 was placed in administrative segregation and accused of attempted escape along with the seven inmates that the Informant had named. At a disciplinary hearing held two weeks later, on the same day as that of the other inmates, Inmate 8 provided a very detailed and credible report of how and why he lost the key, the proper reporting procedures he immediately followed, and how he found the key a short time later. Inmate 8 presented a detailed chronology of the events supported by credible witnesses, and his story checked out. After hearing Inmate 8's testimony and that of his witnesses, the disciplinary board concluded that Inmate 8 had in fact misplaced the key by a genuine accident, that he immediately reported it, and that it

[2] Floyd L. Sherman officially holds the title of Division Operations Manager but he also serves as Deputy Director of Institutions wherein he signs his name as F. Lee Sherman.

was merely coincidence and bad luck that this happened about the same time that the Informant was reporting an escape attempt with a piece of heavy equipment. Stating this on the record, the committee found Inmate 8 not guilty. He has since been released to the electronic monitoring program.

When these reports first came in, the PCC superintendent did not wait for further investigation and corroboration before taking preventive action to foil the rumored escape. Among other proactive measures, the superintendent circulated a memo to all staff members and asked them to report any information or rumors about unusual activity. Three members of the kitchen staff – all DOC employees - submitted memos reporting that they had heard talk of an escape. Two of these staff members, however, had heard the information from the first member, their supervisor, and had no independent knowledge; their reports were merely cumulative. Their supervisor, PCC Food Service Supervisor Jerome Oates, wrote in his memo of May 12, 2014, to the superintendent:

> On 5/9/14 you contacted me requesting any information that I may be aware of regarding a problem that may have occurred at the Medium Facility this past week. I explained to you that there were a few Inmates that have been speaking openly at various times. I have overheard inmates talking in the Minimum Medication Line, the Law Library, Recreation Restroom, Computer Lab and the Medium/Minimum Kitchens. These areas allow for me to hear what Inmates are talking about through the ventilation system or the non-insulated walls. The stories I have overheard suggest there was an escape attempt that was planned at the Medium Facility.
>
> According to the various inmates the plan consisted of inmates killing CO John Yerbury, taking two of the young female CO hostage and while the staff was focused on that situation another Inmate who had a key for the loader was going to run it through the perimeter fence. Once this was accomplished a few Inmates were going to catch any vehicle being operated by an Inmate, pull him from the cab and then take the vehicle off the hill. While walking through the Minimum Dining Room I overheard Inmate [Inmate 9] telling one of the Inmate Bakers about the problem next door but once he realized I was nearby he stopped talking about it. This inmate came to my office on 5/8/14 with an application because he wanted to quit his job in the Kitchen in order to work at the Tool Crib which I have yet to approve.

Mr. Oates went on to describe several unrelated incidents he had heard about, and then stated that he had spoken with the DOC employees on his staff "about the situation involving CO J.F. Yerbury so they would know to remain watchful of any odd behavior." Mr. Oates did not consider the talk he had overheard to be serious enough to report to any of his supervisors or to Security, and concluded:

> . . . since this was Inmates that were speaking about a possible incident that may or may not have happened I did not bring it to your or my Supervisors attention. You had previously made it clear to me that I should not believe what Inmates say because they are not truthful.

One of the other kitchen staff members reported the overheard conversation to Officer Yerbury – the alleged murder plot victim - during a social phone call after hours. CO Yerbury thanked the staff member for the information, but told him "not to worry he knew he worked in a prison and there is always a threat to his safety."

After receiving the Informant's report, Sgt. Buzby continued to investigate by talking to other inmates and monitoring phone conversations in an attempt to find any information that would corroborate the Informant's story. In spite of the Informant's report that the plan was widely known about in the compound and was being openly discussed, and that Inmate 9 had been overheard talking about it or a similar plot, Sgt. Buzby was not successful in uncovering any other information or evidence that in any

way corroborated or supported the credibility of the Informant's report. Inmate 9 was not charged when the other eight inmates were charged.

PCC Writes Up Seven Inmates

On **May 8, 2014**, Sgt. Buzby wrote seven virtually identical Incident Reports, one for each of the seven inmates the Informant had named. These reports each read:

> Infraction Citation & Title: 22 AAC 05.400(b)(3) escape or evasion from custody,(f) – planning or attempting to commit or aiding or encouraging a prisoner to plan or commit an infraction is considered the same as a commission of the infraction itself.
>
> Narrative: On 05/06/2014 thru 05/07/2014 I Sgt. Buzby had been receiving information through a confidential informant that the following inmates [Inmate 3], [Inmate 4], [Inmate 6], [Inmate 2], [Inmate 5], [Inmate 1], and [Inmate 7], [all names and OBSIS numbers redacted by ombudsman] were planning on taking over a certain shift and possibly escaping from Palmer Medium. This information clearly disrupts the orderly administration of the facility. EOR. (End of Report)

In a memo dated **May 12, 2014,** Sgt. Buzby wrote to Superintendent Tomi Anderson:

> On 5/5/14 at approximately 1030 hrs. I was notified by prisoner, [Informant] that several prisoners had been overheard talking about escaping from the Palmer Correctional Center. I asked [Informant] to try to get me some specific information on the individuals. On 5/6/2014 at approximately 0900, I received information from him stating that the following prisoners were the ones involved. [Inmate 1] [Inmate 3] [Inmate 4] [Inmate 2] [Inmate 5] [Inmate 6] (*Sic*) and [Inmate 7]. Apparently they were going to overpower the house officers, and then possibly use a piece of equipment to breach the secure perimeter.

This account did not include Inmate 8, the John Deere operator, or Inmate 9, who was supposedly overheard by kitchen staff discussing the alleged escape.

On **May 13, 2014**, PCC Assistant Superintendent Earl Houser sent copies of Sgt. Buzby's incident reports to then-Director of Institutions Bryan Brandenburg with the following comment:

> Sir, these are the write-up that were done on the individuals associated with the alleged escape plan, ***the security department has not been able to ascertain any other cooperating evidence from any other source***. The inmates on the yard are not willing to talk about the incident Security Sergeant Busby is continuing to contact inmates and monitor the inmate phone system (*sic)*. [Emphasis added]

Director Brandenburg replied that he had not yet seen the reports from the kitchen staff, and Assistant Supt. Houser assured him that they would be sent shortly. When Director Brandenburg asked whether they would be sufficient to support disciplinary action, Asst. Supt. Houser provided his assessment of the case:

> Sir,
>
> The inmate informant from my understanding has given reliable information in the past with other information, drugs and cellphone, I can't really see any reason to dough *(sic)* the validity of this information. We do have other circumstantial information such as using a vehicle to breach the fence, as from the memo's, the day before the security sergeant came to us with the information [Inmate 8] may have been testing the system by holding on to the John Deer keys to

> the loader to see if they would be missed. ***So as you can see there is a lot of parts to the puzzle they somewhat fall together but we have nothing that concrete.*** *(sic)* [Emphasis added]

In spite of his assessment that there was not enough concrete evidence to support discipline, Asst. Supt. Houser scheduled disciplinary hearings for all of the inmates who had been named by the Informant. On May 20, 2014, disciplinary hearings were held for all seven of the inmates and for Inmate 8. Inmate 9 was never charged. The same three staff members made up the Disciplinary Board in all of the hearings. As described above, Inmate 8, the John Deere operator, presented a number of witnesses at his hearing. There was no evidence linking him to any of the other inmates, and the Disciplinary Board found him not guilty.

The disciplinary hearings were cursory for the rest of the inmates. Although he was the only person who had linked any of the inmates to wrongdoing, the Informant was not called as a witness, either within or without the presence of the accused inmates. PCC did not submit any written statements from the Informant into evidence; instead, there was only Sgt. Buzby's uncorroborated hearsay report that according to a confidential informant the seven named inmates "were planning on taking over a certain shift and possibly escaping from Palmer Medium."

The memos from the kitchen staff were read into the record, although they were redacted to remove any names or identifying information. The redaction of names made it impossible for the accused inmates to know that the second two memos were written by people who were merely recounting what they had heard from the author of the first memo, Mr. Oates. Mr. Oates' comment that "this was Inmates that were speaking about a possible incident that may or may not have happened" was redacted. The memos contained no information that could be used to link any of the accused inmates to any particular action. This was the entirety of the evidence presented against each of the seven accused inmates.

All of the accused inmates vigorously denied participation in or knowledge of any plot of any kind. None were allowed to question or to even ask questions about the confidential informant. After very brief hearings, the disciplinary committee found all seven guilty.

Confidential Informant's History

The Informant has been incarcerated since 2013, and he also served several months in 2012. He has been convicted of violent crimes and theft charges. On several occasions, the Informant has served as an informant to correctional officers about prohibited activities occurring in the facility. On several occasions, the Informant's tips have proved reliable, and have led prison staff to uncover drugs and a cell phone in the possession of other inmates.

While the Informant apparently provided some good information in the past, before he reported the "escape" in early 2014, he was disciplined for lying or providing false information to prison officials, a D4 moderate charge. He received a reprimand according to the Alaska Computerized Offender Management System (ACOMS).

The Informant emphatically agreed in an interview with the ombudsman investigator that he expected to receive some kind of reward or preferential treatment in exchange for providing information to the facility, and that he believed providing enough information on his fellow inmates will "get me out of here."

The ombudsman's review showed that the Informant's activities didn't "get (him) out of here" but appeared to have made his life easier when he was written up for a spate of bad behavior in 2014, around the time he reported the alleged escape plot.

A search of ACOMS indicates that during his incarceration that started in mid- 2013, the Informant was charged with 13 disciplinary violations, including the write-up for lying or providing false information.

PCC and GCCC sentenced the informant to a total of 225 days in punitive segregation for the numerous disciplinaries but then suspended all but 50 of those days. ACOMs records also state he was given 20 days work credit against the PCC disciplinaries, so instead of 225 days in punitive segregation he ended up with a total of 30 segregation days for the 10-high moderate C infractions, the two low-moderate infractions, and the one minor infraction that he was found guilty of.

PCC also sentenced him to loss of commissary eight times but at least once PCC staff ordered the loss to run concurrently with the loss of commissary for other charges. ACOMS contained no record that any suspended time was imposed after the Informant's later violations.

The Informant's write-ups and sanctions follow:

Date	**Informant's Disciplinary History**	**Offense Level**	**Finding**	**Sentence**
March 2014	Engaging in Group or Individual Demonstration	C15-High Moderate	Guilty	15 days Punitive Seg (PS) 15 days loss of good time (LGT) **180 Days Suspended Imposition of Sentence** (SIS)
April 2014	Lying or providing false statement	D4 Moderate	Guilty	Verbal Reprimand
April 2014	Possession, use or introducing contraband	C7	Guilty	20 PS/20 LGT **1 year SIS** 50 hours voluntary service
May 2014	**Informant Reports Rumors of Escape Plot**			
June 2014	Engaging in Group/ Individual Demonstration	C15- High Moderate	Guilty	30 PS/10 LGT 1 year SIS, 30 day loss of commissary
June 2014	Engaging in Sexual Acts	C3 High Moderate	Guilty	20 PS/10 LGT **1 year SIS,** 30 day loss of commissary
June 2014	Engaging in Group/ Individual Demonstration	C15	Guilty	35 PS/35 LGT **1 year SIS** 20 days loss of

				commissary
June 2014	Engaging in Group/ Individual Demonstration	C15	Guilty	30 PS/30 LGT **1 year SIS** 20 days loss of commissary
July 2014	Engaging in Group/ Individual Demonstration	C15	Guilty	10 PS /10 LGT **1 year SIS.** 20 days loss of commissary
July 2014	Removing ID wrist band	C6	Guilty	Reduced to E5 failure to follow rule of institution. Reprimand
July 2014	Informational: [Informant] wants transfer to a different institution	NA	NA	NA
July 2014	Refusal to obey a direct order	C19	Guilty	20 PS/20 LGT **1 year SIS** 20 days loss of commissary
July 2014	Threats to another of immediate bodily harm	C14	Guilty	25 PS/25 LGT **1 year SIS,** 20 days loss of commissary
July 2014	Giving or exchanging something of value	D16	Guilty	20 PS/20 LGT loss of commissary concurrent with previous 20 days work credit

Three other incidents were classified as "informationals." One informational report stated that the Informant wanted to be transferred to another institution, the second had no topic listed, and the third said he possibly consumed a medication given to him by "[Informant]." It is possible that whoever posted the informational about the medication copied and pasted the information from another inmate's note into the Informant's or vice versa. But that would imply that the Informant violated a more serious rule without write-up or sanction. The informational for the medication noted no penalty.

The Informant was released from custody in summer of 2015.

The Seven Inmates' Ability to Defend Themselves is Limited

The ombudsman investigator listened to recordings of disciplinary hearings held for the seven inmates named by the confidential informant as well as the hearing for Inmate 8, the driver of the John Deere tractor.

Inmate 1's Hearing

The inmates defended themselves at their hearings as best they could. At his hearing, Inmate 1 denied involvement in or even knowledge of any activity similar to that reported by the Informant. Presenting questions to Sgt. Buzby, Inmate 1 asked when he was seen talking to the other named inmates; Sgt. Buzby's answer indicated he did not really know and was just guessing: "Um, in the, I'd say the previous two, three days before my report was generated." Inmate 1 asked if he had been seen talking to a group or to individuals; again, Sgt. Buzby answered although he did not seem to have any actual knowledge: "Just the individuals that were stated there was all the information I had."

It is clear that Sgt. Buzby did not have any first-hand knowledge of what Inmate 1 supposedly did, only that the Informant had reported that Inmate 1 was "involved" in a plot to take over a shift and "possibly" escape.

Inmate 1 denied even knowing most of the other named inmates. In his defense he appeared to be trying to learn what evidence connected him with any of the other named inmates, but he was not allowed to even pose the question according to the recording of the hearing:

> Inmate 1: Can you prove that I know anybody besides . . .
>
> Committee Chair interrupts: That, that's irrelevant.

Inmate 1 asked whether the confidential informant was himself in trouble and hoping to get out of trouble by providing information; he was again told that his question was irrelevant. Finally, in his own words he questioned the credibility of the informant relative to his own credibility:

> Does my word mean anything in this matter, cause as far as I'm concerned we're both in yellow, I'm in orange, we're both in jail, so how is his word or her word better than mine?

Sgt. Buzby did not answer. The committee chair first evaded the question, and then determined it was irrelevant and did not allow it.

Inmate 1 requested that both he and the informant be given polygraph tests; the hearing panel ignored his request. Including all of the preliminary matters and reading of the various documents into the record, Inmate 1's hearing was over in 10 minutes.

Based on this 10-minute hearing, the committee found Inmate 1 guilty and imposed a penalty of 60 days of punitive segregation and 90 days loss of access to the commissary. Because Inmate 1 was an unsentenced federal prisoner being held on a contract basis, the committee could not could revoke any statutory good time. DOC reclassified Inmate 1 to close custody in June 2014. Two weeks later, he was moved to Goose Creek Correctional Center. His custody status was overridden in January 2015 and reduced to medium custody. However, he was subsequently sentenced for his federal crimes and he is no longer being held being held in Alaska DOC custody.

Per DOC Policy and Procedures Manual policy 700.01 C4,

> 4. Close Custody: Close custody prisoners do not meet institutional standards for medium custody based on their current charges, criminal history, and lack of a substantial period of appropriate institutional behavior. Close custody prisoners are eligible for restricted work assignments within the secure confines of the facility and have access to most education and treatment programs within the facility. Close custody prisoners require housing in facilities with secure perimeter fencing but can be managed and housed in general population with enhanced regular and direct staff supervision. Close custody prisoners do not require two-officer escort or

restraints for normal movement within the facility. Close custody prisoners are not eligible for furlough.

Inmate 3's Hearing

Inmate 3 has been in prison for 44 years; he is serving a life sentence for first degree murder. During his years in prison, Inmate 3 has only been disciplined on two prior occasions: once he was given a verbal reprimand for missing a prisoner count, and once he was given 15 days loss of commissary privileges for failure to follow a written rule of the institution. According to other inmates, Inmate 3 uses a cane or walker and, at over 70 years of age, has limited mobility. The ombudsman investigator asked the Informant how it was that Inmate 3 would be able to participate in a relatively daring escape attempt. The Informant explained that Inmate 3 has approximately a half of a million dollars "in his account" and that he would be financing the escape once the group was outside of the facility.

The ombudsman investigator checked DOC prison inmate account records and learned Inmate 3's prison bank account balance has not exceeded $500 in the past year. It is theoretically possible that Inmate 3 has accumulated substantial wealth over his decades in prison that he keeps in outside institutions, but if he was planning to escape he apparently had not foreseen the obvious fact that any effort to access a bank account would almost certainly put an end to life on the run.

Inmate 3 testified at his hearing that he had no knowledge of any activity similar to what the Confidential Informant had reported, and that in fact when Sgt. Buzby first told him of the allegations he did not understand and thought it was something that the Sergeant had just made up for some reason, possibly as a joke. He testified that he did not know any of the people the Informant had named except for Inmate 6, and that he had never even talked about escaping with Inmate 6 or with anybody else.

Inmate 3 asked to question Sgt. Buzby. He asked if there were other informants involved in giving information, and Sgt. Buzby replied no, only one. He asked how long the sergeant had known the informant, to which Sgt. Buzby answered that he had no personal relationship with him but had known the informant about a year. Inmate 3 tried to formulate a more complex question about the informant, but was unable to phrase it in a way that was understandable. The question seemed to be asking if it was true that the informant had named a lot of other people or said a lot of other things before naming Inmate 3. After Inmate 3 was told that he would not be told the name of the informant, he had no other questions.

Inmate 3's hearing was over in less than 11 minutes; he was found guilty and sentenced to 30 days in punitive segregation, 40 days loss of commissary access, and 365 days loss of statutory good time. Inmate 3 was transferred to Spring Creek Correctional Center on June 18, 2014, and at his next scheduled classification on September 26, 2014, he was reclassified to close custody. As of this writing he is housed at the Spring Creek Correctional Center.

Inmate 2's Hearing

Inmate 2, in preparation for his hearing, had requested to have several witnesses present. The disciplinary board committee denied the request, but allowed him to provide written questions for the witnesses to his hearing advisor. One of the hearing officers, Sergeant R.H. Hall, presented the questions to two of the witnesses, Inmate 4 and Inmate 6, who were two of the other named inmates that Inmate 2 knew from the prison's internal Residential Substance Abuse Treatment (RSAT) program. Inmate 4 and Inmate 6 each prepared written responses to Inmate 2's questions, and these were read into the record. Inmate 4 and Inmate 6 discussed in writing the goals and standards they had adopted for themselves through their RSAT programming, which they said would have been inconsistent with the accusations.

Both men admitted possible minor failings at times in consistently meeting their own higher standards of conduct, but both specifically denied any participation in or knowledge of a plan to take over a shift or escape, or any other misconduct of that magnitude.

Inmate 2 also prepared written questions for the House 4 probation officer. Sgt. Hall interviewed the probation officer without Inmate 2's presence. Inmate 2 appeared to be attempting to generate evidence that he had been seeking parole and therefore had an incentive to avoid misconduct. His questions to the probation officer read:

- What did I request for you to do?
- Where did I want to go next spring?
- I told you I wanted to work as a mentor at RSAT program till spring and go to Kenai, and study my math so I will be ready when I get down there, to take the classes they have to offer, electrical, plumbing, carpentry, etc. so I will have certificates to show the Board of Parole in 2019, a career.

To the first two questions, Sgt. Hall interlineated "I don't recall." Although the final question is phrased as a statement, presumably Inmate 2 intended it as a leading question. There is no response to the final question, other than the handwritten notation "Interviewed by Sgt. Hall 5/19/14 @ 1137."

*[**Ombudsman Note:** Two paragraphs of the report have been deleted at this point pursuant to AS 24.55.160[3]. These paragraphs describe Inmate 2's request to admit potentially exculpatory evidence, and questionable explanations from the Department for why the evidence was suppressed.]*

Inmate 2 also requested to interview an inmate identified as "D.K." [name and initials changed to protect the identity and privacy of the inmate] in seg. (segregation)" In his later appeal, Inmate 2 refers to D.K. as [name redacted by Ombudsman] and states that he "heard Ms. Hauser called his name on intercom, trying to pronounce last name, but couldn't so she called him D.K."

D.K. was housed in segregation at PCC at the time Inmate 2 was in segregation. Sgt. Hall did not interview D.K. and simply wrote "not allowed" above the questions Inmate 2 had written for him. It does not appear that anyone ever asked Inmate 2 to help clarify the identity of this witness. At the hearing, while reading preliminary information, Disciplinary Board chair Sergeant [Elizabeth] Hauser stated, "You asked for D.K. in seg, [segregation] which we do not have anyone in seg by that name," and quickly moved on. Despite the assertion that no such person existed, Sgt. Hauser later wrote in one report of the committee's decision,

"D.K." in seg not allowed because it would create a threat to security.

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[3] **AS 24.55.160. Investigation procedures.** (a) In an investigation, the ombudsman may
(1) make inquiries and obtain information considered necessary;
. . .
(4) notwithstanding other provisions of law, have access at all times to records of every state agency, **including confidential records**, except sealed court records, production of which may only be compelled by subpoena, and except for records of active criminal investigations and records that could lead to the identity of confidential police informants.
(b) The ombudsman shall maintain confidentiality with respect to all matters and identities of the complainants or witnesses coming before the ombudsman except insofar as disclosures may be necessary to enable the ombudsman to carry out duties and to support recommendations. **However, the ombudsman may not disclose a confidential record obtained from an agency.** (§ 1 ch 32 SLA 1975; am § 9 ch 71 SLA 1990)

The report mentioned no difficulty in ascertaining D.K.'s identity.

The written questions Inmate 2 asked to be presented to "D.K." suggest that he suspected the identity of the Informant and that he believed the informant had a history of making false statements against other prisoners he didn't get along with.

The ombudsman does not know what caused Inmate 2 to suspect he knew the identity of the confidential informant. Because the Department expressed great concern for the safety and anonymity of the informant, the ombudsman investigator did not ask Inmate 2 or any of the complainants questions that might lead them to suspect anyone of being the informant. There also is no evidence that Sgt. Hall, Sgt. Buzby, or anybody else ever attempted to interview "D.K." to investigate Inmate 2's allegation that there had been a previous incident between the confidential informant and the accused inmates that would cast serious doubt on the informant's credibility.

Denied the opportunity to question his witnesses, Inmate 2 testified about his progress in his programming, his desire to engage in pro-social behavior to better the community he was in, and his hopes that within a year the Parole Board would allow him to go home and see his family. Inmate 2 denied any kind of discussions with any of the other named inmates regarding anything resembling an escape or takeover plan. The Disciplinary Board did not ask Inmate 2 any questions. Including more than eight minutes of preliminary procedure and reading written material into the record, Inmate 2's hearing was over in less than 12 minutes.

Inmate 2 was sentenced to 365 days loss of statutory good time, 40 days of punitive segregation, and 60 days loss of commissary access. He was transferred to Spring Creek Correctional Center on June 28, 2014, and he was reclassified from medium to close custody on July 17, 2014. His scheduled release date after the addition of the 365 days of lost good time was set back to January 1, 2030 according to ACOMS.

Although only three of the seven inmates filed complaints with the Ombudsman, the investigator listened to recordings of all seven hearings. The remaining four hearings were similar to those of the complainants, both in their brevity and their result.

Reports of Disciplinary Hearing Decisions

After the hearings were over, Disciplinary Committee Chair Sgt. Hauser filled out DOC form 809.04c, which is a two-page "Report of Disciplinary Decision." The form contains 18 questions with blanks to be filled in, and a line for the chairperson's signature and date. The first 12 questions are general information, such as the inmate's name and birthdate, the institution, the charged infraction, etc. Lines 13 through 18 are for a description of the case and the committee's reasoning. As can be seen below, the written answers are not responsive to the questions on the form, and provide little or no useful information about the committee's reasoning.

Disciplinary Board Ruling on Inmate 1's Charges

In Inmate 1's report, lines 13 through 18 read as follows. Handwritten portions are in italics:

13. Summary of Prisoner's statement: Plea: *Not Guilty*

    I never planned an escape. I only know [Inmate 4] & [Inmate 5] in passing. I think am be targeted because I am a high profile federal inmate.

14. Summary of Witness Testimony:

    Sgt Buzby you were seen with the other 2 or 3 days before my report [sic]

15. Summary of Adjudication Decision: Including reasons, evidence considered and specific facts upon which finding is based:

60 PS [Punitive segregation]

90 Loss Commissary

16. Summary of disposition decision: Including reasons, factors considered and specific elements upon which disposition is based:

Report, Memos, Testimony

17. Attachments: Yes (identified below): _____ No (Reason(s) why not): _____

["Yes" circled by hand; no attachments identified]

Evidence: [blank]

Report of Witnesses and/or Evidence Disallowed, Limited or Not Called:

None

18. The Summary Finding: Including the prisoner's intention, or waiver, to appeal the Committee's decision:

[blank]

Intends to Appeal: [checked] Tape Copy: *14-170*

Disciplinary Board Ruling on Inmate 3

For reasons that are not clear, Inmate 3's file contains two reports of disciplinary action, both signed by Sgt. Hauser on May 20, 2014. These printed forms are formatted differently, but contain identical preprinted questions. The first is signed by Inmate 3, also on May 20; the second is not.

Inmate 3's first form reads:

13. Summary of Prisoner's statement: Plea: *Not Guilty*

The statements were made by CI – no idea who he is

I only know [Inmate 6], Never talked to any of the others. I don't know any of them.

No knowledge or spoke of any like escaping

I would not get myself involved in anything like this

14. Summary of Witness Testimony:

Was there other informants – no just 1

No personal relationship. 1 yr. Sgt. Buzby response

15. Summary of Adjudication Decision: Including reasons, evidence considered and specific facts upon which finding is based:

Reports, memo's

16. Summary of disposition decision: Including reasons, factors considered and specific elements upon which disposition is based:

30 PS, 365 LSGT [Loss of Statutory Good Time], 40 Days Loss Commissary

17. Attachments: Yes (identified below): _____ No (Reason(s) why not): _____

[blank]

Evidence: [blank]

Report of Witnesses and/or Evidence Disallowed, Limited or Not Called:

Other Prisoners Giving Character References

18. The Summary Finding: Including the prisoner's intention, or waiver, to appeal the Committee's decision:

[blank]

Intends to Appeal: Yes [circled]

Inmate 3's Second Form

The second report was not signed by Inmate 3. The handwritten entries vary somewhat from Sgt. Hauser's first report:

13. Summary of Prisoner's Statement: Plea: *Not Guilty*

I have no idea who this C-I is. I only know [Inmate 6]. I have never talk to the others mentioned. I have no knowledge or spoke of anything like escaping.

14. Summary of Witness Testimony:

Sgt Buzby stated that the CI had been reliable in the past. No I have no personal relationship with him.

15. Summary of Adjudication Decision: Including reasons, evidence considered and specific facts upon which finding is based:

30 Days PS [Punitive segregation]

365 LSGT [Loss of Statutory Good Time]

40 Days Loss Commissary

16. Summary of disposition decision: Including reasons, factors considered and specific elements upon which disposition is based:

Memos from, Mr. Cobb, Mr. Oates, Sgt Buzby

Sgt. Buzby Incident Report, Also 'G' Rule of Evidence

17. Attachments: Yes (identified below): [checked] No (Reason(s) why not): _____

Evidence: [blank]

Report of Witnesses and/or Evidence Disallowed, Limited or Not Called:

Questioning CI disallowed because it would create of reprisal or threat to security [sic]

18. The Summary Finding: Including the prisoner's intention, or waiver, to appeal the Committee's decision:

[blank]

Intends to Appeal: [checked] Tape Copy: *14-179*

Inmate 2's Disciplinary Finding

As with Inmate 3's file, Inmate 2's file contains two different report forms. While neither sheds any light on how the board managed to find Inmate 2 guilty of anything, what little information is recorded varies slightly between the two forms. In both forms, the "Summary of Witness Testimony" does not say anything about what any witnesses testified to. The narrative portion of the first form, which was not signed by Inmate 2, reads:

13. Summary of Prisoner's Statement: Plea: *Not Guilty*

To my knowledge I have not violated DOC or RSAT rules.

I have tried to hold myself to a higher standard.

I do not associate with anyone named.

14. Summary of Witness Testimony:

Chose not to question writer of report

He requested some other prisoners be asked questions

Was granted to show that they do know each other [Ombudsman Note: [Inmate 2], [Inmate 4], and [Inmate 6] all were participating in the RSAT program]

15. Summary of adjudication decision: Including reasons, evidence considered and specific facts upon which finding is based:

40 PS [Punitive Segregation]

365 LSGT [Loss of Statutory Good Time]

60 Loss Commissary

16. Summary of disposition decision: including reasons, factors considered and specific elements upon which disposition is based:

Report, Memo's, questions & answers from other I/Ms.

"G" Rule of Evidence

17. Attachments: Yes[circled] (identified below): _____ No (Reason(s) why not):_____

[blank]

Evidence:

None admitted

Report of Witnesses and/or Evidence Disallowed, Limited or Not Called:

CI not allowed to be questioned for fear of reprisal

"D.K." in Seg not allowed because it would create a threat to security

18. The Summary Finding: Including the prisoner's intention, or waiver, to appeal the Committee's decision:

[blank]

Intends to Appeal: __*yes*__ Tape Copy: *14-182*

The first report in Inmate 2's file lists Sgt. Hauser as the chairperson and Sgt. Hall as a member. In the second report, Sgt. Hall is listed as the chairperson, and Sgt. Hauser is listed as a member. Sgt. Hauser signed both reports. The narrative portion of the second report, which also contains Inmate 2's signature, is as follows:

13. Summary of Prisoner's Statement: Plea: *Not Guilty*

To my knowledge I have not violated DOC or RSAT rule.

I have tried to hold to higher standard.

I do not associate with anyone named.

I have no idea about what I am being accused of. [Ombudsman Note: This response was not included in the first report.]

14. Summary of Witness Testimony:

Chose not to have report writer

Witness Questions & Answers

[Ombudsman Note: In the first report on Inmate 2's disciplinary there was a third answer to this entry. The notation "Was granted to show that they do know each other" was in the other report form but not included in this one.]

15. Summary of adjudication decision: Including reasons, evidence considered and specific facts upon which finding is based:

Reports, Memo's, Witness Questions & Answers

16. Summary of disposition decision: including reasons, factors considered and specific elements upon which disposition is based:

40 PS (Punitive Segregation)

365 Loss SGT [Statutory Good Time]

60 days loss commissary

17. Attachments: NO (Reason(s) Why not

_____Yes (identified below)_____

[blank]

Evidence:

[blank]

Report of Witnesses and/or Evidence Disallowed, Limited or Not Called:

[blank]

18. The Summary Finding: Including the prisoner's intention, or waiver, to appeal the Committee's decision:

[blank]

Inmate intends to appeal Yes [circled] No

The Three Inmates Appeal Their Disciplinary Finding:

All three of the inmates who filed complaints with the Ombudsman appealed the committee's decision in their cases to PCC Superintendent Tomi Anderson. **Inmate 3's** appeal suggests he may have difficulties with literacy, but the point of his appeal was clear enough:

> I don't understand why ! I was targted on this. I never know any thing about this was just made up by so. called: confidential informant with Sgt Buzby I'm being punhish for something I did not do or know about not true.(*sic*)

In response, Superintendent Anderson wrote,

> BASED ON THE INCIDENT REPORT, STAFF MEMORANDUMS, AND RELIABLE CONFIDENTIAL INFORMANT'S TESTIMONY, I CONCUR WITH THE DISCIPLINARY COMMITTEE'S GUILTY FINDING (B3-F) AND PENALTIES. THE CONFIDENTIAL INFORMANT WAS NOT CALLED TO TESTIFY AT THE DISCIPLINARY HEARING DUE TO THE RISK OF REPRISAL. DISCIPLINARY APPEAL: DENIED EOR. *(sic)*

Inmate 3 appealed the superintendent's decision to the Director of Institutions:

> Disciplinary action is very discussing because This informant statements are very (unjusafied) in having sgt. Buzby and committee/hearing officer showing (favortisum to this I/M so called Lies) this absoluty – Not True being penalize of staff Informant (Lies) some thing just made up just to get me in trouble I have not done any thing wrong on any of these statements.(*sic*)

In response, F. Lee Sherman, signing as Deputy Director of Institutions, wrote, "Appeal denied, concur with Supt.'s findings."

Inmate 1, in his appeal to the superintendent, wrote,

> I'm appeal the writeup that I was found guilty of on the grounds that none of it is true. They did not find me with any evidence supporting these allegations. The CI story don't add up I don't know 4 of the perps. I also feel Im being target by inmates and staff at P.C.C. In 21 months I had no violence I got no jail history the only write up is a c-14 for a [illegible][4]. None of the questions I asked were responded to in proper form also what makes the CIs word better than mine we're both lock up doing time. And his story makes no sense if you really look into it. The bulldozer thing is so far fetch (*sic*)

Superintendent Anderson's reply was virtually identical to her response to Inmate 3:

> BASED ON THE INCIDENT REPORT, STAFF MEMORANDUMS, AND A RELIABLE CONFIDENTIAL INFORMATE'S TESTIMONEY, I CONCUR WITH THE DISCIPLINARY COMMITTEE'S GUILTY FINDING (B3-F) AND PENALTIES. THE CONFIDENTIAL INFORMANT WAS NOT CALLED TO TESTIFY AT THE DISCIPLINARY HEARING DUE TO THE RISK OF REPRISAL. DISCIPLINARY APPEAL: DENIED EOR. (*sic*)

Inmate 1's appeal to the Director of Institutions was lengthy, comprising more than two pages with another page appended that contained the questions Inmate 1 had tried to ask at his hearing that were not allowed. Inmate 1 wrote in part,

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[4] According to DOC Policy 809.02.VII Procedures A C14, a C-14 infraction is for threatening another person with immediate bodily harm.

> I'm sorry sir for being so long winded but its just real frustrating to me how this is going on. Even Buzby said he only did 2 day investigation. They can play back all my phone calls, they read all my mail and nothing supports or implicates me in the story the CI made up. Please look it at sir & have it throw out on lack of evidence or let me take a pollygraph test about this please sir. (*sic*)

Again, the Deputy Director's response was identical to what he wrote in Inmate 3's appeal: "Appeal denied, concur with Supt.'s findings."

Inmate 2 enumerated eight points in his appeal to the superintendent. The first three were technical: he received his write-up after five working days, his advisor was not present in spite of his request for her presence, and that at some point the chair covered the microphone with a file folder. Inmate 2's fourth point was, "Hearsay 'I heard them say is inadmissible evidence when the accuser [can] be present to prove his statement's. *(sic)*" In his fifth point Inmate 2 describes his participation in the RSAT program and the standards by which he lives as an RSAT graduate and mentor at PCC. In the sixth point he denies any knowledge of the information alleged by the confidential informant, and disavows any kind of act of violence. In the seventh point Inmate 2 generally requested a fair and thoughtful review on appeal, and in the eighth point Inmate 2 illustrates that there has never been evidence or even an allegation that he had any specific contact with any of the supposed coconspirators:

> What is the time and date [Inmate 2] (OB #Redacted) and the other's met? said confidential informant.
>
> Inmate 3(OB #Redacted)
>
> Inmate 4 (OB #Redacted)
>
> Inmate 6 (OB #Redacted)
>
> Inmate 5 (OB #Redacted)
>
> Inmate 1 (OB #Redacted)
>
> Inmate 7 (OB #Redacted)

In her decision, the superintendent did not answer Inmate 2's points, nor did she give any indication that she had even read them. Her response was identical to her decisions in the other appeals, except that she replaced "disciplinary appeal" with "grievance appeal":

> BASED ON THE INCIDENT REPORT, STAFF MEMORANDUMS, AND RELIABLE CONFIDENTIAL INFORMANT'S TESTIMONY, I CONCUR WITH THE DISCIPLINARY COMMITTEE'S GUILTY FINDING (B3-F) AND PENALTIES. THE CONFIDENTIAL INFORMANT WAS NOT CALLED TO TESTIFY AT THE DISCIPLINARY HEARING DUE TO THE RISK OF REPRISAL. GRIEVANCE APPEAL: DENIED EOR.

In his appeal to the director, Inmate 2 reiterated his first three points. He reiterated and expounded somewhat his fourth point:

> Hearsay "I heard them say is inadmissible evidence, when the accuser be present to prove his statement's are true present the confidential informant. It was on the Disciplinary's duty to prove such statements are true. And the time of the hearing of individual was heard, that was not in the report. I could have had valid alibi's to concur where I was. What time did confidential heard

> said individuals made these plans? between 5-6-14 thru 5-8-14 the times. was it say 3:00 am for example. no specific time was told. Did not give me a chance to defend my right's. *(sic)*

Inmate 2 expanded on his fifth point, and introduced different arguments for his sixth and seventh points:

> 6. There are five R.S.A.T. residents that are accused of B-3-F three of us are mentor's Mr. [Inmate 2] Mr. [Inmate 6] Mr. [Inmate 4], two clients Mr. [Inmate 3], Mr. [Inmate 7], there are two people I don't know [Inmate5] [Inmate 1]'s.
>
> 7. I called two witnesses Mr. [D.K.] I heard Ms. Hauser called his name on intercom, trying to pronounce his last name, but couldn't so she called him D.K. I knew because I was with him, he'd prove that the confidential Info was vindictive, and has done this before in another institution, my accuser is giving false information, because I checked his negative attitude about P.C.C. staff, and not liking certain individuals 4 from R.S.A.T that I remember him asking who they were.
>
> One was male P.O taking care of [illegible] in House Four I didn't know his name, I went to see him about going to Kenai / and being a mentor one more year show I could study math, this year to be ready to take classes next year. that was one of my goals I was working toward, and being a positive role model in P.C.C. he said he would look into it. *(sic)*
>
> And none were even called.

As the chair of the committee, Sgt. Hauser had told [Inmate 2] that there was no one in segregation named D.K. Inmate 2's allegation that Sgt. Hauser did in fact know of an inmate whom she herself had referred to as D.K. raises serious questions about the committee's willingness to conduct a fair hearing.

Like Superintendent Anderson, Deputy Director of Institutions Sherman declined to address any of the points Inmate 2 had raised, and he gave no more indication that he had read Inmate 2's appeal than the superintendent had. Like the superintendent, he provided a response that was identical to his response in the other appeals:

> Appeal denied, concur with Supt.'s findings.

ANALYSIS AND PRELIMINARY FINDING

AS 24.55.150 authorizes the ombudsman to investigate administrative acts that the ombudsman has reason to believe might be contrary to law; unreasonable, unfair, oppressive, arbitrary, capricious, an abuse of discretion, or unnecessarily discriminatory, even though in accordance with law; based on a mistake of fact; based on improper or irrelevant grounds; unsupported by an adequate statement of reasons; performed in an inefficient or discourteous manner; or otherwise erroneous.

The ombudsman evaluates evidence relating to a complaint against a state agency to determine whether criticism of the agency's actions is valid, and then makes a finding that the complaint is *justified*, *partially justified*, *not supported*, or *indeterminate*. A complaint is *justified* if, on the basis of the evidence obtained during investigation, the ombudsman determines that the complainant's criticism of the administrative act is valid. Conversely, a complaint is *not supported* if the evidence shows that the administrative act was appropriate. If the ombudsman finds both that a complaint is *justified* and that the complainant's action or inaction materially affected the agency's action, the complaint may be found *partially justified*. A complaint is *indeterminate* if the evidence is insufficient "to determine conclusively" whether criticism of the administrative act is valid.

The ombudsman may investigate to find an appropriate remedy.

ALLEGATION 1: CONTRARY TO LAW: The Department of Corrections Palmer Correctional Center denied inmates charged with identical disciplinary infractions with a meaningful opportunity to appeal a disciplinary conviction by failing to make findings of fact in an administrative hearing.

The Alaska Supreme Court has had several occasions to review the rights of inmates in prison disciplinary hearings. The court in 1975 found that:

> . . . like their federal counterparts, state constitutional rights do not entitle prisoners to the full panoply of rights accorded in criminal proceedings. Nonetheless the rights are substantial.[5]

In one of the first Alaska cases involving due process rights in disciplinary proceedings, *McGinnis v. Stevens,* the court adopted the then-recent findings of the United States Supreme Court in *Wolff v. McDonnell*[6] that forfeiture of statutory good time and placement in "solitary" confinement, also known as segregation, each constitutes deprivation of "liberty" under the Fourteenth Amendment. The Alaska court found that the Alaska Constitution provided the same protections as the U.S. Constitution in this context, and some additional protections. The *Wolff* court specifically found that the Fourteenth Amendment of the Constitution required "a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action."

In *Brandon v. State*[7], Brandon claimed that the hearing committee report was inadequate because there were no findings of fact by the disciplinary committee. The committee simply stated that Brandon was found guilty. Brandon argued that without any findings of fact he could not know whose testimony was believed and what evidence was relied on. The court found:

> Without findings of fact it is difficult for an inmate to know exactly what formed the basis for the conviction, and to obtain meaningful review. In this case it is clear that not everything in the reports was true, otherwise Brandon would have been found guilty of the stolen radio charge. Furthermore the reports list "contraband" seized from Brandon including two large paper bags of candy, two ballpoint pens, one roll of tape, twelve AA batteries and three AAA Batteries. There are no findings that these items in fact are all "contraband." While the disciplinary committee may rely on the reports, it is still the task of the committee to be the finder of fact and determine which facts found in the reports support violations of regulations.

To ensure protection of this constitutional right, 22 AAC 05.475(a)(3) requires a disciplinary tribunal to prepare a written decision document that contains:

> . . . a statement of the disciplinary tribunal's adjudicative and dispositive decisions and the reasons for those decisions, including a statement of the evidence relied upon and the specific facts found to support the disciplinary tribunal's decision."

DOC Policy and Procedures Form 809.04c, the Report of Disciplinary Decision, appears to be intended to serve as the structure for the written decision. In particular, line 15 calls for a "Summary of Adjudication Decision: Including reasons, evidence considered and specific facts upon which finding is based." The space provided under line 15 is not enough for a detailed explanation of what the board

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[5] *James v. State, Department of Corrections,* 260 P.3d 1046 (Alaska 2011); *McGinnis v. Stevens,* 543 P.2d 1221, 1226, (Alaska 1975).

[6] *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed. 935 (1974).

[7] *Brandon v. State, Department of Corrections,* 865 P.2d 87 (Alaska 1993).

believed had happened during the incident in question and why, but the form does provide for attachments.

In some of the reports, the committee chair wrote nothing more in line 15 than an abbreviation of the penalties imposed, such as PS, LGT, etc. In one case she wrote, "reports, memos." It is possible that the chair misunderstood the form and did not know which line to use for findings of fact, but there are no other lines that contain findings of fact for any of the inmates. The most detailed response to any question on the form is the response to line 16, which calls for reasons, factors considered, and specific elements upon which disposition is based, in Inmate 3's report: "*Memos from, Mr. Cobb, Mr. Oates, Sgt Buzby Sgt. Buzby Incident Report, Also 'G' Rule of Evidence."*

However, it is not possible to tell what allegations in any of the memos or the report were relied upon, either to support the truth of any specific fact or the disposition. It also is not clear what the "'G' Rule of Evidence" refers to. Nowhere in the record is there a written narrative explanation of what the board found to be true and why.

A review of the D-Board recordings showed that at no time were any of the inmates told on the record specifically what it was that they did to merit punishment. The committee merely said each of them was guilty. To this day, the inmates (and any reviewing entity) cannot tell from the record what it is that the committee thinks that each of them actually did, when and where they did it, or how the board knows that they did it. One could speculate or imagine that perhaps some of the named inmates formulated a plan in a group discussion somewhere or that they passed written messages or conveyed spoken messages. If the board had found that any of the inmates had engaged in some specific action or behavior, and stated which witness or document supported that belief, the inmates could defend themselves on review by showing error in the committee's reasoning. With no findings of fact in any of the cases, speculating and imagining is all one can do.

The board's failure to make written findings of fact on the right form might in some cases be harmless error if it could be shown that somewhere, perhaps verbally on the record or in some other document, the committee made it clear what it believed actually happened and why. In each of these cases, however, the committee clearly and plainly failed to do the basic task it was charged with: review evidence and make findings of fact, or determine that there is insufficient evidence to make findings of fact.

Because the DOC disciplinary committee failed to make findings of fact in compliance with 22 AAC 05.475, the United States Constitution as interpreted in *Wolff*, and the Alaska Constitution as interpreted in *Brandon v. State* and subsequent cases, the ombudsman proposes to find this allegation ***justified***.

ALLEGATION 2: CONTRARY TO LAW: The Department of Corrections Palmer Correctional Center imposed punitive sanctions on inmates charged with identical disciplinary infractions without sufficient evidence.

In criminal cases, so long as there is enough evidence that a reasonable person could find a person guilty of the charged offense, reviewing courts do not substitute their judgment for that of the trial court on issues of fact. It is a well-established principal that the finder of fact, having had a first-hand chance to examine the evidence, is always in the best position to evaluate its credibility. The ombudsman adopts a similar stance; the ombudsman does not second-guess a finder of fact, in this case the disciplinary committee, so long as there is sufficient evidence to support a finding, and the finder of fact has adequately explained what evidence it relied on and why.

Three items purport to serve as evidence in these cases: Sgt. Buzby's report, the memos from the three kitchen staff members, and Inmate 8's reported loss of the loader key.

According to 22 AAC 05.455(a), "If a prisoner does not request the presence of the facility staff member who wrote the disciplinary report, the report may be considered as evidence by the disciplinary tribunal and alone may serve as the basis for a decision." This regulation is predicated on an assumption that the incident report will contain alleged facts about an incident so that the inmate and the finder of fact will understand what action is alleged as a violation. Usually, the writer of the report will have been a witness to some specific action. This is why the law requires the report to be written by the staff member with the most knowledge about the incident, and that the writer be subject to questioning if the accused so requests.

Sgt. Buzby's report is merely accusatory. The report states that Sgt. Buzby "had been receiving information" that the seven named inmates "were planning on taking over a certain shift and possibly escaping." The report alleges that there is some information, but it does not say what the information is. For example, the report does not allege that on a specific day the inmates met at a specific place and did a specific thing. The report contains a *conclusion* that the named inmates are guilty, but it does not state any details that, if true, would support the conclusion. The Informant could have named any number of inmates, and accused them of all sorts of violations; Sgt. Buzby would not be in a position to write a report stating facts that could be accepted to find guilt of the accused violation, nor would it be possible for the accused inmates to defend themselves, not knowing on what basis they are being accused.

It should be clear that the issue here is not necessarily the Informant's credibility, despite numerous reasons to suspect his truthfulness and his motivations, nor the fact that the accusation is entirely uncorroborated hearsay. The problem is that the Informant did not say, or Sgt. Buzby failed to convey, what it is that the inmates actually *did* that would form a basis for suspicion. They were not accused of any specific act of planning, conspiring, aiding, or assisting anything. They were merely named as guilty parties. Such an accusation would of course be good reason for Sgt. Buzby to investigate the inmates to determine whether they had done anything to further some kind of plan, and it is understandable that the prison initially confined the named inmates while it sorted out the rumors that the Informant was repeating. But there is nothing in the report that the committee could use to say, "This is what you did that makes us think you were planning, aiding, attempting, or encouraging someone else to commit a violation." Because it contains no allegations of fact, Sgt. Buzby's report cannot be considered evidence in this case, even though incident reports usually may be relied on as evidence.

Any information that Sgt. Buzby might have actually obtained from the Informant fails as evidence for the simple reason that it is not in the record. According to 22 AAC 05.455(a), "The decision in the adjudicative phase of the hearing must be based only on evidence presented at the hearing."

The only information from the Informant that was presented at the hearings was Sgt. Buzby's statement that he had heard the seven inmates "were planning on taking over a certain shift and possibly escaping from Palmer Medium." This opinion is enough to pique curiosity and concern, and it invites the presentation of evidence to support it, but it is not evidence of any particular fact. The committee elected not to call the Informant as a witness, for fear he would suffer reprisal. When such a risk exists, the law does permit the committee to call a witness without allowing the accused to confront the witness. But after excusing the accused, the committee is still expected to hear the witness and evaluate credibility outside of the presence of the accused inmate. A risk of reprisal does not shift the burden away from the facility to prove guilt.

Inmate 8's loss of the key to the John Deere loader originally seemed to be one of the most solid bits of evidence that at least somebody in the facility was contemplating misdeeds with a loader. But Inmate 8's suspicious circumstances cannot be considered as evidence against any of the named inmates because there is nothing linking him to any of them, and because the same committee members exonerated Inmate 8 of any wrongdoing, and found the loss of the key to be merely an accident.

The final items of evidence are the three memos from the kitchen staff. As noted above, two of these memos merely recount what the memo writers heard from their staff supervisor, Jerome Oates. Because they are merely cumulative and not based on personal knowledge, these two memos have no evidentiary value.

The memo from Mr. Oates is double hearsay: it says that Mr. Oates said that "various inmates" said some *other* inmates were planning to kill Sergeant Yerbury, take two female guards hostage, drive a loader through the fence, commandeer a vehicle, and escape. It is unknown how the "various inmates" came across this information. As talk making the rounds, the further layers of hearsay could be considerable, and it is difficult to say that this bit of information rises above the level of being merely overheard gossip. The initial question, however, is not whether the evidence is particularly credible, but whether it is evidence at all that Inmate 1, Inmate 2, Inmate 3, or the other named inmates committed any violation of facility rules.

Even if Mr. Oates' memo was regarded as admissible evidence, it suggests only that some persons in the prison were planning to escape. There is nothing in Mr. Oates' memo that names, or even points to, any of the inmates that Sgt. Buzby says the Informant thinks were planning to escape. Conceivably, leaving the issue of the Informant's sketchy credibility aside, this memo might be useful to corroborate some other item of evidence. There are, however, no other items of evidence in the record linking the accused inmates to any act of wrongdoing, and therefore there is nothing that this memo can be considered to corroborate. The memo has no evidentiary value against any particular inmate.

At the onset of the PCC investigation, Sgt. Buzby wrote to Director Brandenburg that he was going to listen to the recordings of the seven inmates' telephone calls, presumably to see if they were plotting the escape with others outside the prison. The disciplinary hearings included no mention whatsoever of checking the phone calls, either because it was never done or, more likely, that it yielded no evidence that would confirm the plot existed.

Likewise, PCC did not find – or else did not present – the clothing that the Informant said the conspirators were collecting for their alleged escape attempt. Nor was Sgt. Buzby able to get anyone other than [Informant] to discuss the alleged plot.

When examined individually, each item the Department presented at the hearings to support the accusations fails as useful evidence. The Department has the burden of proving guilt by a preponderance of the evidence – is it more likely than not that an action happened - in this case it did not present any useful evidence at all. Because there is no evidence in the disciplinary hearing record that links any of the accused inmates with any particular violation of a prison rule, the ombudsman proposes to find this allegation ***justified***.

> ***ALLEGATION 3: CONTRARY TO LAW: The Department of Corrections Palmer Correctional Center denied inmates charged with identical disciplinary infractions due process by not allowing the inmates to confront witnesses against them in disciplinary hearings.***

At their hearings, none of the inmates asked to confront the Informant, who they only knew as the Confidential Informant, or any of the writers of the memos. It is clear from the record that some of the inmates thought the memo authors and the confidential informant were all one person. The complainants told the ombudsman investigator that they were informed in advance that they would not be allowed to confront the informant, so they did not ask. This appears to be correct, as the superintendent directly stated in all of her appeal decisions that "the confidential informant was not called to testify at the disciplinary hearing due to the risk of reprisal." The superintendent told the investigator that use of confidential informants is routine in PCC disciplinary hearings, and that they are almost never called as witnesses in any hearings because of the risk of reprisal. When asked why they are not called outside the presence of the accused, the superintendent explained that because of the layout of the facility, the inmates are able to observe who enters the building where hearings are held and deduce who the informant is. In the opinion of the superintendent, the safety of inmate informants outweighs any possible technical or legal concerns.

While the law does allow the department to question witnesses without the accused's presence when there is a risk of reprisal, the law cannot be stretched so far as to excuse the department from calling the witness altogether and relying solely on a hearsay report instead, especially hearsay that is so vague it is of little or no value in determining what, if any, misconduct actually occurred. Further, the Supreme Court has warned "that it is the 'exceptional case' where the disciplinary committee chairman should refuse to call a witness.[8]

The superintendent's assertion that it is impossible to question confidential informants because of the risk of reprisal is disingenuous. As one inmate pointed out at his hearing, he had been transferred to Goose Creek Correctional Center by the time of his hearing, so there was little risk of reprisal. It is difficult to believe that the Corrections staff exercises so little control over the facility that it lacks the ability to discreetly call an informant into a private room for questioning, perhaps at a different time than when the rest of the hearing is conducted, to be questioned. At the very least, if the committee had any interest in actually learning what it was the Informant really knew and how he knew it, the committee could have easily asked him.

Further, the committee demonstrated in Inmate 2's case the ease with which written questions could have been put to the Informant at the inmates' request. It is unlikely this would have satisfied the right to confront an adverse witness, but it certainly would have been superior to the committee's decision to find the inmates guilty without admitting any evidence at all. It may have also shed some light on the truth, and by not taking even minimal steps to question the available witness the committee has invited speculation that guilty findings, not truth, are the only things it was interested in finding.

Finally, the Department's protestations that it needed to protect the identity of the informant fail for the simple reason that at least two of the three complainants knew who the informant was all along, and the Department was aware of that fact. Inmate 1 knew who the informant was because, as a federal inmate being held on contract, the facility notified the U.S. Marshals of the accusation. A federal marshal interviewed the Informant, and apparently found nothing useful in the interview and pursued the matter no further. The marshals notified Inmate 1's attorney, and according to later emails within the department, the attorney notified Inmate 1.

For his part, Inmate 2 believes he knows the identity of the Confidential Informant. His appeal indicates that when he heard the accusations he tried to think who might have concocted a false accusation against

[8] *Brandon*, 865 P.2d at 90 (quoting *McGinnis*, 543 P.2d at 1230).

him, and his suspicion fell upon an inmate whom he had confronted in RSAT. His suspicions were heightened first by the fact that most of the accused inmates were also RSAT participants, and again when another inmate told Inmate 2 that at the time of the accusations the Informant had been asking around for the names of the particular RSAT members who were then charged.

Inmate 2's hypothesis might be incorrect; if the committee had called Inmate 2's witness, D.K. in seg, the truth might be known. Inmate 2's explanation makes as much sense as anything else in this matter, and it probably could have been verified or discredited by questioning the one inmate being held in segregation with the initials "D.K." Again, the committee has at the least given the appearance that its intent was to bury, not reveal, the truth.

While the department might argue that the need to protect the Informant's identity, in spite of the fact that it was already known, created "the exceptional case" where a witness should not have been called in the presence of the accused, there is no legitimate excuse for not at least allowing the inmates to prepare questions that the committee could have put to the witness privately. It is difficult to imagine a more flagrant violation of an inmate's right to confront an adverse witness than that presented by this case. The ombudsman proposes to find this allegation ***justified***.

> ***ALLEGATION 4: CONTRARY TO LAW: The Department of Corrections Palmer Correctional Center violated applicable regulations by failing to state orally on the record why confidential informants were not called to testify at disciplinary board hearings and by failing to prepare required reports documenting reliance on confidential informants.***

According to 22 AAC 05.430(c),

> The hearing officer or chairperson, as applicable, of the disciplinary tribunal may decline, for compelling reasons, to call a witness that the accused prisoner or advocate has requested to appear, and may restrict the introduction of other evidence to avoid repetitious or irrelevant evidence or to avoid a risk of reprisal or undermining of security. The hearing officer's or chairperson's, as applicable, reason for declining to call a witness or admit evidence **must be noted orally for the record**. If the prisoner is found to have committed an infraction, the hearing officer or committee chairperson, as applicable, shall file a report, to be attached to the completed disciplinary tribunal report, listing all persons the prisoner requested to appear but were not called to testify, or other evidence sought to be introduced but which was not admitted. This report must contain a brief statement of the reasons why the persons were not called, or the evidence was not admitted. [Emphasis added]

As the source of the only possible evidence that could have incriminated the seven accused inmates, the Informant should have been called as part of the Department's case. However, when the committee determined that it was necessary to exclude the Informant as a witness because of the risk of reprisal, it incurred a legal duty to prepare an additional report, attached to a completed disciplinary tribunal report, listing the Informant's name and a statement of the reasons he was not called. While the statement may be brief, simply writing "risk of reprisal" is probably inadequate. The statement, had there been one, should have explained why the risk of reprisal was compelling in this particular case.

When the evidence excluded is the testimony of a confidential witness, under 22 AAC 05.435(b) the:

> . . . reasons for denying confrontation must be noted orally for the record. Under this subsection, "if the accused is found to have committed an infraction, the chairperson **shall** file a report listing the persons the accused was not allowed to confront, the reasons for the action, the extent to which that testimony was relied upon, and facts upon which the disciplinary tribunal

> could have reasonably concluded that the person was credible and spoke with personal knowledge, or gave reliable information. [Emphasis added]

It would have been interesting and helpful to hear how the board reasonably concluded that the Informant was credible and spoke with personal knowledge. Unfortunately, the board did not even attempt to prepare a document to comply with this legal requirement. The department might argue that it was not required to file this report, because it never even called the Informant as a witness. To rely on this argument, the department would have to exclude reference to the confidential informant in Sgt. Buzby's report, which would leave nothing in the record even mentioning any of the seven accused inmates. Again, the board's failure to follow its own laws indicates that none of the inmates received a fair hearing.

The committee's failure is particularly egregious in Inmate 2's case. Among other witnesses Inmate 2 asked to question D.K., who may have been able to discredit the Informant's information. Although Inmate 2 was told there was no D.K. in seg, the committee chairperson later reported in writing that D.K. was not called because doing so would have created a "threat to security." Under these circumstances, the committee's failure to explain in writing why D.K. was not called, with an explanation of what the threat to security was and why it could not be mitigated, is inexcusable.

The ombudsman proposes to find this allegation ***justified***.

RESPONSE FROM THE DEPARTMENT OF CORRECTIONS:

The Department of Corrections did not respond to any of the above allegations individually. On June 23, 2015, Commissioner Ronald Taylor responded to all of the allegations with a single paragraph:

> I am responding to your preliminary findings for [Inmate 1], [Inmate 2], and [Inmate 3]. In each of these complaints, the inmates alleged the department imposed disciplinary sanctions on them without due process of law. The Department believes that any prisoner has the right to have their disciplinary decision reviewed by the superior court to determine, if any violation of due process has occurred. This is a remedy that was available to each of these inmates, and should be considered an adequate remedy under AS 24.55.110(1).

OMBUDSMAN COMMENT:

The Department's response reflects a stunning lack of accountability for unlawful conduct, failure to perform duties in accordance with prescribed standards, and unjustifiable waste of public resources.

To put the matter in the simplest possible terms, the Department accused seven men of extremely serious crimes, ignored their pleas for the most basic levels of justice and, with no credible evidence whatsoever, found them guilty and punished them severely. Throughout this process the Department repeatedly violated its own regulations, and repeatedly failed to implement the reviews required by law that should have corrected this series of errors. The Department has further wasted a great deal of state resources with unnecessary legal proceedings.

The Ombudsman does not submit this report as an advocate for the inmates involved, but as a review of the performance of a state agency. This report alleges systemic failure of the Department of Corrections to do its job, with repeated failures to follow the law at three hierarchical levels of review. The Ombudsman does not accept the Department's effort to gloss over a failure of this magnitude as a minor technical violation of an inmate's due process rights. Nor does the Ombudsman agree that litigation with inmates is the best solution when the Department is not doing its job. The best solution is for the

Department to do its job correctly in the first place, and avoid burdening the courts and the public with unnecessary and costly litigation.

The commissioner's response implies that the Department of Corrections should not be held to the same level of professional conduct and accountability to which every other state agency, and even individual citizens, are subject. If the Department of Revenue wrongfully denies applicants their PFDs, the victims can go to court to get their dividends. If the Department of Transportation negligently builds faulty bridges, victims of a bridge collapse can go to court and sue for damages. If a person steals money from another person, the victim can go to court to recover his money. If a person is speeding and driving drunk, the police can take the person to court to hold them accountable, and accident victims can sue for their damages. The availability of judicial remedies does not justify wrongful behavior in the first place, nor does it excuse government agencies from doing their jobs.

Like every other state agency, the Department of Corrections is charged with doing a specific job in accordance with established minimum standards. While the blatant trampling of the rights that all Americans cherish is obviously an important concern, this case is also about a state agency simply performing, or not performing, its assigned job. The fact that a judicial remedy may be available to those injured by a state agency's failure to follow minimum standards is irrelevant to the question of whether the state agency is properly performing the tasks it has been charged with, and whether the people of the state should tolerate substandard performance from their government. The availability of a judicial remedy is even less significant in the face of documented disregard for the law spanning decades. The Ombudsman submits that the people of Alaska should not have to wait until their government is taken to court by its victims for the government to begin following its own laws and performing in accordance with established minimum standards that are accepted elsewhere across the nation.

Reliance on the courts to correct the Department's errors is an inadequate solution for several reasons. First, access to the courts costs more money than most inmates have. Inmates in disciplinary proceedings do not have a right to appointed counsel. Finding and paying an attorney from inside a prison who is willing to accept a disciplinary appeal for an indigent inmate is such a high bar that few inmates are likely to ever accomplish it.

While there have been cases in which inmates have been able to represent themselves all the way to the Supreme Court, the vast majority of inmates lack the legal skills to obtain a hearing in the superior court and successfully articulate their appeals, even when they have winning cases. A large percentage of inmates lack basic literacy skills. The Ombudsman has observed numerous cases over the years in which inmates with valid complaints have attempted to appeal to the courts, but despite their best efforts have been unable to even get their cases past the court clerk, much less before a judge.

This case presents a perfect example of the inadequacy of a judicial remedy. Although there was no evidence to find any of the seven inmates guilty, and six of them were punished with, among other penalties, an extra year of incarceration, only one of the inmates was able to get his case to court, with the help of an attorney. After exhausting two layers of appeal with no indication they were being heard, the rest appear to have simply given up. The Ombudsman notes that, at the time the Commissioner wrote his response, the Department's lawyer was actively opposing the inmate's motion to have his attorney's fees paid by the Department, even though the Department had already conceded its case against him.

Next, reliance on the judicial remedy places an unfair financial burden on other agencies and on the public. The time of judges, court clerks, support staff, and assistant attorneys general all cost substantial amounts of money. Congested court dockets are already a burden on the people of Alaska, who have

other problems, both civil and criminal, that they need the courts to resolve. Particularly in these times of declining revenue and strained budgets, it is unacceptable for the Department of Corrections to dump its problems on other agencies and on the public without at least making a credible effort to resolve the problems before they end up in court.

This case illustrates another indirect but substantial burden on the state's budget. In this case, six of the inmates were punished with a year's loss of statutory good time, the equivalent of six man-years of expensive and unnecessary incarceration. Most disciplinary cases stem from much less serious accusations, and inmates are routinely assessed a few weeks or months of statutory good time. In the vast majority of cases, inmates will not seek an attorney to go to court over a few weeks of lost good time, regardless of whether they are innocent. They will simply serve out the additional prison time, at public expense.

Unfortunately, this case is not an isolated aberration. The Ombudsman's office has recently seen a number of legitimate complaints about the Department's failure to properly conduct disciplinary hearings and the wrongful punishment of inmates, particularly at Palmer Correctional Center, by revocation of statutory good time. Currently, the Criminal Justice Commission is seeking explanations for and solutions to the state's soaring prison population. Eliminating excessive revocation of statutory good time, particularly when inmates have broken no rules, would be an obvious place to start.

In considering the Department's response, it cannot be emphasized too much that this case was entirely one of the Department's own making. There is no evidence that any of the accused men did anything wrong in this matter, or that they had any knowledge or awareness of anyone else doing anything wrong. The accused inmates made every possible effort available to them to resolve the matter administratively within the Department's normal appeal process without having to burden the courts and the public. This is not a case of troublemakers demanding rights; this is a case of the Department creating a problem, failing to resolve it, and then telling the victims they can go to court if they are unhappy and have their problems resolved at public expense. It is hard to imagine a better example of senseless government waste.

PROPOSED RECOMMENDATIONS:

RECOMMENDATION ONE: The findings of guilt in this case should be vacated, any resulting changes to the inmates' classification and custody level should be reversed, and their good time restored to them.

The lack of evidence in this case does not stem from technical legal issues or a lack of effort on the part of the department. The security sergeant attempted to find genuine evidence implicating these inmates and was unable to do so, most likely because none exists. While it is probable that some inmates were spreading gossip about an escape plan, there is simply no credible evidence that the plot existed, that these seven inmates had anything to do with it, or indeed had any knowledge of it. Inmates are presumed innocent until proven guilty by a preponderance of the evidence; the department had no credible evidence. The records of these inmates should be changed to reflect this truth.

Agency response:

The Department requests that this recommendation be modified. This issue was brought to our attention through litigation in the superior court by Inmate [Inmate 2]. In reviewing the case, the Department determined that it was appropriate to reverse the disciplinary proceedings against him and not pursue the matter further. The Department also reviewed each of the related cases

regarding the escape incident and reversed them as well. All findings have been rescinded and any related disciplinary or classification documents have been removed from the inmates' files.

Ombudsman Comment:

The issue, that seven men were being punished despite a lack of evidence of wrongdoing, was brought to the Department's attention long before Inmate 2's court litigation began. All seven of the inmates notified a three-person panel of the issue in formal hearings. The facility superintendent was then repeatedly notified of the issue by the appeals that each of the inmates filed. When she ignored the problem, the inmates each appealed to the Director of Institutions, who in turn ignored the problem. Finally, the Ombudsman gave written notice of the investigation of Inmate 1's complaint, A2014-0895, to PCC Superintendent Tomi Anderson on July 10, 2014. The ombudsman notified Superintendent Anderson of the investigation of Inmate 2's complaint, A2014-1059, on July 30, 2014; and of the investigation of Inmate 3's complaint, A2014-1275, on August 14, 2014. The Ombudsman invited the Department to discuss the matter and seek an informal resolution; the Department responded by refusing to provide requested information until the Ombudsman served the Department with a subpoena. Rather than being unaware of the issue, it appears that the Department was actively trying to conceal it.

Contrary to the Department's response, it does not appear that even litigation was enough to prompt the Department to actually review its case. In court, Inmate 2 argued that the case should have been dismissed for lack of evidence. Court records show that rather than wait to hear what the superior court judge had to say about the matter, the Department decided to hold an entirely new disciplinary hearing for Inmate 2, stating that:

> [Inmate 2]'s claim that the court should grant his appeal on the ground that there is no evidence to support the decision is also without merit. The Department will provide the appropriate confidential informant documentation during the rehearing process which establishes [Inmate 2]'s guilt.

However, when Inmate 2 was finally allowed to present questions to the informant in preparation for a new hearing, the informant refused to answer them, and Sgt. Buzby admitted that he did not "***check or even investigate this incident***." At Inmate 2's second hearing, the new hearing officer was not so willing to give the department a pass on proving its case, and wrote that

> The cornerstone of this incident was with the confidential informant and the testimony provided. It is the department's obligation to be able to demonstrate why the confidential informant is credible and the information accurate. The credibility of the confidential informant was critically damaged when it was discovered that the prisoner had fourteen disciplinary actions against him in the previous twelve months to include for lying to staff. Additionally, the confidential informant refused to cooperate with this re-hearing. The testimony for the basis of this infraction is hearsay due to the issue of credibility. No physical, video or audio evidence was collected to corroborate the allegation.

It was not an honest review of the matter by the Department that ended this case, but rather ombudsman intervention and an independent hearing officer's finding that the department had failed to present any credible evidence of guilt.

RECOMMENDATION TWO: The Department should issue a written letter of apology to each of the seven inmates.

The disregard for the civil rights of the inmates in this case is not excusable. The inmates should not have been subjected to this treatment

While statutory good time may be restored, each of the inmates have already served punitive time in isolation. Further, before being exonerated, their classification and custody levels were changed based on their erroneous convictions and they were moved to higher security institutions where they remain to this day.

This injustice cannot be undone, and the inmates deserve an apology and acceptance of responsibility by the agency. Issuing letters of apology will also serve the purpose of impressing upon the agency the need to avoid similar incidents in the future, while not costing the public any money. Finally, written letters of apology will be useful to the inmates as they go back to the parole board, treatment programs, and other third party entities and try to restore what they have lost because of this event.

Agency response:

The Department respectfully rejects this recommendation, as we believe that the actions taken under the first recommendation is sufficient.

Ombudsman Comment:

While the Department has reversed the disciplinary cases against the inmates, it cannot undo the months that they have spent in solitary confinement for something they did not do. And, none of the inmates have been returned to PCC arguably is the least disagreeable prisons in the system. Inmate 3, now 73, remains at maximum security Spring Creek. Nor has the Department ever admitted any error. Considering the Department's long history of ignoring constitutional law and its own regulations, the public cannot expect genuine change from the Department absent some sign of responsibility for its failures.

Part of the job of the Department of Corrections is to teach respect for the law and accountability for actions. The Ombudsman urges the Department to teach by example.

RECOMMENDATION THREE: The Department should review suspect disciplinary hearings conducted at Palmer Correctional Center over the last year.

Unfortunately, the issues that arise in this case do not represent an isolated incident. Over the last year the Ombudsman's office has received an unusual surge in the number of complaints about disciplinary hearings at Palmer Correctional Center, and a number of these appear to be justified. Considering the degree of injustice and the apparent pattern, the department should appoint an independent entity, preferably including at least one experienced criminal law attorney, to review disciplinary proceedings at Palmer Correctional Center over the last year. This person or entity should be given authority to vacate cases in which evidence is lacking or the department's own rules have been violated.

Agency response:

The Department agrees with this recommendation, and has reviewed all cases related to this escape incident, as stated above.

Ombudsman comment:

The Department's response shows that it has either not read the recommendation, or is refusing to give a serious response. The recommendation clearly referred to other disciplinary hearings at Palmer Correctional Center over the last year, not the false accusations made against the seven inmates named in this report, and it called for appointment of an independent entity to review other suspect cases.

With its response, the Department has illustrated its persistent unwillingness to even acknowledge errors, much less display a sense of accountability.

The Ombudsman was prepared for a response to this recommendation containing reasonable discussion of expense, administrative burden, or possible alternative solutions. Instead the Department has disingenuously evaded the issue by pretending not to have understood the recommendation. The Ombudsman can imagine legitimate reasons why the Department might elect not to implement this recommendation exactly as presented, but the people of Alaska deserve a more honest response from their government when its activities are called into question.

> ***RECOMMENDATION FOUR: The Department should develop a plan to ensure that future disciplinary hearings at Palmer Correctional Center are based on sound evidence and are fairly conducted according to law.***

While it is tempting to simply recommend additional training for correctional officers who conduct hearings, it is not clear that simple lack of knowledge is the reason for PCC's noncompliance with the law. Nor is it certain that training alone, even when undertaken in good faith with the best of intentions, will be adequate to provide the department with the tools needed to meet the legal requirements that the state and federal supreme courts have mandated in disciplinary hearings. Though always willing to assist and consult, the Ombudsman believes that an internal discussion within the department to evaluate needs and deficiencies will be more likely to lead to a workable plan.

While accused inmates do not have the same civil rights as defendants in criminal cases, they do have substantial rights that cannot be protected without understanding them; a certain degree of legal knowledge is an essential requirement for conducting a fair hearing in accordance with state and federal law.

The Alaska Supreme Court has been critical of the way in which disciplinary hearings have been held for 40 years, and yet little appears to have changed.[9] The department should consider whether conducting disciplinary hearings, especially for more serious offenses, is reasonably considered a normal duty of correctional officers, or whether it would be more efficient to have hearings conducted by legally trained staff members, or officers from an outside agency such as the Office of Administrative Hearings, thus freeing correctional staff to attend to their normal duties within the facility.

> **Agency response:**
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> The Department agrees with this recommendation. After an internal review of disciplinary proceedings and procedures, the Department provided additional training to all designated disciplinary hearing officers in April 2015. This training included the issues which were presented in these disciplinary matters, as well as other issues which the Department identified during its review.

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[9] *Brandon* was decided in 1975; see *DeRemer v. State, Department of Corrections*, Alaska Supreme Court #14647 (unpublished Memorandum Opinion & Judgment no. 1517, October 1, 2014).

Ombudsman comment:

Again, the Department has avoided the issue. The recommendation explained why the Ombudsman does not believe that merely sending hearing officers to a one-day training session will be adequate to change the Department's long history of ignoring the law, and it recommended that the Department develop a plan for genuine change beyond mere training. Without explanation, the Department responded that it has sent the hearing officers to a training session. The Department completely ignored the recommendation that it consider referring hearings to an outside agency.

The Ombudsman is never opposed to training when needed. In this case, the law designates the superintendent and then the director of institutions as the review officers who will ensure that the hearing officers are following the law. The facts of this case show that these officials are in as much need of training as the hearing officers themselves, if lack of training is indeed the problem. With no credible method in place to review future hearings, it is not possible to determine whether anything will have changed at Palmer Correctional Center. Given the reluctance of the Department to display any sense of responsibility and accountability in this case, the Ombudsman regretfully remains skeptical that there has been any genuine reform.

CONCLUSION:

The Department did not dispute any of the allegations. While the Department has finally dropped the false accusations against the inmates in this case, it did not do so voluntarily, but only after a hearing officer found the accusations to be unfounded. Some of the punitive sanctions against the inmates can be reversed, but there is no remedy for the months of solitary confinement that the Department wrongfully forced upon the inmates. Further, the Department has not demonstrated meaningful efforts or verifiable procedures to prevent similar injustices and wastes of public resources from occurring in the future. The Ombudsman finds all four allegations in this case to be ***justified*** and ***not rectified.***

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